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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1032

CITY OF COLUMBUS, *et al.*,

Petitioners,

—v.—

ROBERT LEONARD, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents submit this brief in opposition to show that the decision below does not conflict with applicable decisions of this Court or other circuit courts, and does not require any exercise of supervisory authority by this Court. The decision below was rendered by a unanimous court, sitting en banc, whose thirteen members, after full briefing and oral argument, ruled that the District Court's dismissal of the respondents' complaint, on jurisdictional, abstention and federalism grounds, was improper and required reversal. For the following reasons, the Court of

Appeals decision was perfectly correct, and raises no issues warranting review by this Court.

STATEMENT OF THE CASE

In the spring of 1971, the respondents and other black police officers became concerned about discrimination in the Columbus, Georgia police department - discrimination in hiring, in disciplinary matters, in police treatment of the black community. (Pet. App. 18a-19a). When their efforts to work through channels proved unsuccessful, the respondents formed an organization called the Afro-American Patrolman's League, prepared a petition detailing their charges of discrimination, and held a press conference to communicate those grievances to the public.

Several weeks later, following the arrest of a black police officer for missing a court appearance, the respondents conducted impromptu picketing in front of the police station. The next day, after a cooling off period had presumably been worked out, two of the respondents, who were officers of the League, were nevertheless called in by police officials and told they were going to

be suspended and brought up on charges. (Pet App. 19a). Upset by what they thought was unfair treatment, the respondents met on the morning of May 31, 1971 and decided to again picket in front of police headquarters.

Accordingly, they resumed their peaceful protest in front of the police department that afternoon. They carried hand-lettered signs with statements such as, "We Don't Want To Be Policeboys - We Want To Be Policemen." As part of their protest, the respondents carefully removed a small American flag insignia from their uniforms and stated that, because the flag meant liberty and justice, they would not wear the emblems until they received those things for which the flag stood. (Pet. App. 19a-20a). The men were all off-duty at the time, and the entire episode lasted less than an hour.

Immediately thereafter, the men were called into the police station and advised that they had been summarily dismissed from the police force. They were each handed a letter stating their dismissal was for "conduct unbecoming an officer which might be detrimental to the service" and "any other act or omission contrary to good order

and discipline of the department," in that they "did publicly remove the American Flag from the Columbus Police Uniform while picketing in front of Police Headquarters on May 31, 1971." (Pet. App. 20a-21a). Later that afternoon, the Public Safety Director held a press conference at which he read a press release, charging that "these officers have repetitiously made baseless allegations of unlawful conduct, racism, and discrimination against their fellow officers, the Director of Public Safety, Chief of Police and ranking officers. They did not present their grievances through channels prior to other public proclamations and accusations." (Pet. App. 21a).

The respondents were summarily dismissed without a prior hearing, notice of charges, or an opportunity to respond. In addition, they were dismissed in violation of Columbus City Ordinance No. 71-7, which had been enacted earlier that year to create a Police Hearing Board and establish disciplinary procedures for the Department. (Pet. App. 22a, 43a-55a). The respondents contended that their dismissals were effectuated without the procedural safeguards

afforded by the Ordinance, because only the Board, not the police officials, had the power to dismiss members of the Department.

On June 4 and again on June 9, 1971, the respondents' counsel contacted police officials stating that the respondents wished to preserve their rights to a hearing before the Board. On June 10, the Deputy Police Chief replied that hearings would be scheduled "in the near future."

On June 18, 1971, this action was filed in the United States District Court for the Middle District of Georgia, on behalf of 38 black officers in the Department, seeking declaratory and equitable relief and monetary damages. As to these respondents, who had been dismissed on May 31, 1971, the complaint alleged that their dismissals violated their First Amendment rights of speech, association and petition, and their Fourteenth Amendment right to due process and equal protection. They also claimed, as a matter of pendent jurisdiction, that the manner of their dismissal was in contravention of the procedures established in Ordinance No. 71-7. The complaint sought a determination that the dismissal was unconstitutional, an injunction

requiring reinstatement and back wages, and an award of monetary damages. The complaint did not challenge or seek to enjoin the enforcement of any statute or ordinance, nor to interfere with any state judicial or administrative proceedings.

After the suit was filed, on June 24 and 25, the police officials delivered letters to the respondents advising them that Board hearings would be held on June 28. The letters restated the original charges against each respondent and then set forth a number of additional charges based on alleged conduct prior to their dismissals. (Pet. App. 22a-23a). The hearings were held in July, 1971, before the Police Hearing Board, which consisted of two permanent civilian members, four police officers, and, as presiding officer, the Safety Director who had fired the respondents. The dismissal of each of the respondents was sustained, in most cases by a divided vote of 4 to 2, with the Safety Director not voting. The respondents did not file suit in state court to review the Board's action. The Board itself was abolished in the Fall of that year, less than a year after its creation.

This action then proceeded into discovery, and was readied for trial in December 1974. A three-day trial was held in early February, 1975, with the respondents claiming that their dismissals had been unconstitutional and unlawful and seeking monetary damages and reinstatement.

At no time throughout the proceedings, from the time the complaint was filed in 1971 through the trial in February 1975, did the petitioners ever move to dismiss the complaint on jurisdictional, abstention or federalism grounds. Nor, similarly, did they ever raise any defense of res judicata.

Nevertheless, following a three-day, non-jury trial, with no motion ever made by the defendants, the District Court, sua sponte, entered its order dismissing the complaint. The essence of the ruling was as follows:

> By attempting to invoke the jurisdiction of this Court after invoking the jurisdiction of the Police Hearing Board, the plaintiffs have sought the forbidden 'second bite.' They seek to relitigate the same cause of action, based on the same set of facts, merely by changing legal theories and sovereignties. They do so despite the availability

> of a state process of judicial review of decisions of quasi-judicial tribunals such as the Police Hearing Board. (Pet. App. 5a).

Though not characterizing it as such, the District Court was clearly invoking a form of res judicata, by holding that the request for an administrative hearing and the failure to "appeal" the adverse administrative decisions to the state courts precluded the respondents from litigating any of their claims in federal court.

The District Court also held that the claimed violation of the procedures of Ordinance No. 71-7, rendered the federal action barred by the abstention doctrines of Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), and Burford v. Sun Oil Co., 319 U.S. 315 (1943). (Pet. App. 12a). Similarly, the court ruled that even though "we are not asked in this case to enjoin the state court proceedings," the respondents' action was nevertheless barred by the doctrine of Younger v. Harris, 401 U.S. 37 (1971), as applied to interference with an ongoing, "administrative proceedings which is quasi-judicial in nature." (Pet. App. 12a-15a).

The respondents appealed the dismissal of their complaint, and in May, 1977, a unanimous panel of the Fifth Circuit reversed that dismissal and remanded the case for a decision on the merits, holding this case controlled by Moreno v. Henckel, 431 F.2d 1299 (5th Cir. 1970), and finding nothing in this Court's extensions of the Younger doctrine which would require federal plaintiffs to seek state judicial review of local administrative action. (Pet. App. 24a-26a).

A petition for rehearing en banc was granted, argument was fully heard, and the Fifth Circuit unanimously sustained the panel's ruling. Three judges subsequently filed a special concurring opinion, joining in that result, but questioning whether the Moreno case still retained its full precedential vitality. (Pet. App. 28a-33a).

REASONS FOR DENYING CERTIORARI

This is the classic case for federal court adjudication. The respondents are black public employees who were summarily dismissed from their official positions for criticizing the policies of the police department by which they were employed.

Claiming that such adverse administrative action violated their rights under the First Amendment, deprived them of due process of law and denied them the equal protection of the laws, they filed a Section 1983 action against the local officials seeking injunctive relief and monetary redress for what had been done. At the same time, they exhausted their available administrative remedies. When those remedies were unsuccessful, they pressed for an adjudication of their federal claims on the merits in federal court. They sought no interference with any state judicial proceeding, criminal, civil or otherwise, they asked for no injunction against, or even interpretation of, any state statute, and they did not seek to "appeal" from any state court decision. They simply sought traditional 42 U.S.C. Section 1983 relief against traditional Section 1983 defendants.

Nevertheless, the petitioners, like the District Court, invoke a variety of jurisdictional, procedural and federalism doctrines which they claim are offended by permitting a federal decision on the merits in this case. The lynchpin of their argument is that the

respondents' request for an administrative Police Board hearing irrevocably committed them to state court jurisdiction for all purposes and on all claims. There is not a single decision of this Court which supports that argument or requires that conclusion. On the contrary, all of the decisions of this Court which have dealt with the problem of adjusting federalism interests have made it clear that this case remains the paradigm for federal adjudication.

1.

Since the respondents did not seek to "appeal" to the District Court from any state judicial proceeding or decision, and did not seek to "relitigate" any matters decided against them by any state court, the doctrines announced in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and Angel v. Bullington, 330 U.S. 183 (1947), are wholly inapplicable here. Those cases involved parties who, having unsuccessfully litigated issues in state courts, then attempted to relitigate those issues in a subsequent federal proceeding, where they were met with preclusion of

their claims. Those cases applied rules and concepts of res judicata and collateral estoppel, which cannot be applied here.

First, and quite simply, the respondents never filed any suit in state court. The Police Hearing Board was an administrative agency, with none of the independence, expertise, permanence, procedures, standards, or remedies which characterize judicial bodies. The Board could not afford the respondents the full relief which they claimed, and it was abolished a few months after the respondents' hearings. This Court has characterized far more regular and established agencies as "administrative" rather than judicial. See, e.g., Gibson v. Berryhill, 411 U.S. 464 (1973) (optometry board); Withrow v. Larkin, 421 U.S. 35 (1975) (medical examining board).[1/] Similarly, the arguable availability of state court judicial review, on mandamus or certiorari, of the Board's actions cannot transform the Board itself into a judicial body for

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1/ Indeed, at trial, the petitioners themselves, as well as their attorney, characterized the Board hearings as "administrative hearings." (T. 104, 393).

purposes of res judicata or collateral estoppel. The respondents' request for a Board hearing was in no way tantamount to filing a lawsuit in court. [2/]

Second, even assuming arguendo that requesting a Board hearing was the functional equivalent of filing suit in state court, res judicata principles nevertheless cannot be employed here because res judicata is an

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2/ Nor has this Court ever suggested that where state judicial review of final administrative decisions is available, persons aggrieved by such local administrative action must pursue such state appeals and, therefore, foreclose themselves from federal court action. On the contrary, this Court has frequently adjudicated civil rights actions without requiring the plaintiff to seek state judicial review of an administrative decision. E.g., Goss v. Lopez, 419 U.S. 565 (1975); Wood v. Strickland, 420 U.S. 308 (1975); Dixon v. Love, ___ U.S. ___, 52 L.Ed. 2d 172 (1977). And this Court has recently reaffirmed the doctrine that "a federal equity plaintiff challenging state administrative action need not have exhausted his state judicial remedies." Huffman v. Pursue, Ltd., 420 U.S. 592, 609, n. 21 (1975). Any other rule, and especially the one contended for by the respondents, would only deter litigants from exhausting administrative remedies for fear that they would thereby be irrevocably committed to state court jurisdiction of all their claims.

affirmative defense which was never pleaded by the petitioners, even though they had every opportunity to do so, and must therefore be deemed waived. E.g., Blonder Tongue Laboratories v. University of Illinois Foundation, 402 U.S. 350 (1971); Sosna v. Iowa, 419 U.S. 393, 396, n. 3 (1975); Huffman v. Pursue, Ltd., supra, 420 U.S. at 607, n. 19.

2.

The kinds of state interests protected by the Pullman abstention doctrine are wholly unaffected by the decision below. The typical case for Pullman abstention involves a challenge to the enforcement of a complex statute, whose meaning as a matter of state law is uncertain, where resolution of that underlying state law issue - usually a question of whether the statute applies to the plaintiff - will be dispositive of the federal issue and thereby obviate the need for federal constitutional adjudication. See, e.g., Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975); Boehning v. Indiana Employees Association, 423 U.S. 6 (1975).

None of these factors exists here. There was no state statute being challenged or even interpreted. The pendent state law issue - whether the petitioners had failed to comply with the procedures of their Ordinance in summarily dismissing the respondents - was only one of several claims raised by the respondents. A state court ruling that the Ordinance required a hearing prior to, rather than following, dismissal would not have obviated the respondents' claims that their dismissal violated the First Amendment, due process and equal protection, thereby entitling them to equitable relief and monetary damages.

Finally, the mere existence of state law questions does not justify invoking abstention: "It is, of course, true that abstention is not necessary whenever a federal court is faced with a question of local law...." Reetz v. Bozanich, 397 U.S. 82, 86 (1970). If the need to examine local ordinances and regulations in order to adjudicate constitutional claims were sufficient to warrant abstention, then none of the myriad suits challenging the actions of local governmental institutions, see, e.g.

Perry v. Sinderman, 408 U.S. 593 (1972); Goss v. Lopez, supra; Wood v. Strickland, supra; O'Connor v. Donaldson, 422 U.S. 563 (1975), could ever be maintained in federal court.

3.

For similar reasons, the doctrine which counsels federal court abstention to avoid interference with complex, statewide, administrative processes, involving basic state policies over natural resources or comparable matters, see Burford v. Sun Oil Co., supra; Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951), is wholly irrevelant here. There was no statewide, statutory scheme of a continuing nature, aimed at securing important public policy interests, and there was no statutorily designed mechanism, with thorough and automatic judicial review as an integral part, to administer that scheme. Rather, there was an ad hoc municipal body, with no continuing regulatory or policy-making functions, which met sporadically to consider individual cases, and which was abolished within a year of its creation. As this Court observed,

just last month, in rejecting a Burford claim:

> Unlike Burford, however, this case does not involve complex issues of state law, resolution of which would be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976). And there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy. Zablocki v. Redhail, 46 U.S. Law Week 4093, 4095, n. 5 (Jan. 18, 1978).

4.

The interests served by the doctrine of equitable abstention are not involved in this proceeding.

The petitioners attempt to assimilate this case to the Younger doctrine by obscuring the critical distinction between administrative proceedings and state judicial proceedings. The central concern of the Younger doctrine is "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. at 41.

Since there was no such attempt or proceeding here, that should have ended the matter. Indeed, the Younger decision itself made clear that the doctrine did not apply to the situation here, namely, "...an injunction against allegedly unconstitutional state action (discharging the employees) that is not part of a criminal prosecution." 401 U.S. at 47, n. 4.

Moreover, despite the recent extensions of the Younger doctrine, it still remains limited to cases where a federal plaintiff is seeking (1) direct injunctive relief, (2) against ongoing state judicial proceedings, (3) of an enforcement nature, (4) brought to vindicate important state interests, (5) in the enforcement of criminal or quasi-criminal laws, or (6) in the protection of state judicial processes. None of these factors is present here. For this reason, neither Juidice v. Vail, ___ U.S. ___, 51 L.Ed.2d 376 (1977), nor Trainor v. Hernandez, ___ U.S. ___, 52 L.Ed.2d 486 (1977), casts any doubt on the respondents' right to federal adjudication of their claims. Those cases involved challenges to state judicial enforcement mechanisms in the context of

ongoing state judicial proceedings against the federal plaintiffs. In both cases, this Court rejected the efforts of federal plaintiffs to prevent state court judges or state court officials from enforcing those mechanisms against them. No case could be further from those interests than this one, with no ongoing judicial proceedings in which the respondents could raise all their federal claims, no challenge to the enforcement of state judicial mechanisms or procedures, and no effort to enjoin the enforcement of any state statute. 3/

3/ Nor does Gibson v. Berryhill, supra, suggest that the Younger interests are threatened here. What Gibson does suggest is that where a federal plaintiff is seeking to resist adverse action by a fair and unbiased state administrative agency, it may be appropriate for the federal court to permit the administrative hearing to be concluded in order to ensure that the challenged action is final and the federal claim is thereby ripe. Here, the respondents did resort to the administrative hearing, and administrative remedies were exhaused soon after the federal suit was filed. Moreover, Gibson also made clear (1) that even Younger interests are inapplicable where, as here, the administrative procedure is structurally or institutionally defective, and (2) that in any case, the availability of judicial review, de novo or otherwise, at the conclusion of the administrative proceedings does not compel the federal plaintiff to seek such review and does not invoke Younger interests if he fails to do so.

5.

The petitioners, invoking the generalized notion of "Our Federalism," invite the Court to grant certiorari in order to rule that Section 1983 plaintiffs must exhaust their state judicial remedies as a prerequisite to their federal suit. The contention borders on the frivolous. Since Monroe v. Pape, 365 U.S. 167 (1961), this Court has consistently held that, in the absence of a pending state judicial proceeding or an unsettled and dispositive question of state law, exhaustion of state judicial remedies cannot be required. The Court reiterated these principles just last month:

> First, the District Court was correct in finding Huffman and Younger inapplicable, since there was no pending state-court proceeding in which appellee could have challenged the statute. See Wooley v. Maynard, 430 U.S. 705, 710-11 (1977). Second, there are no ambiguities in the statute for the state courts to resolve, and - absent issues of state law that might affect the posture of the federal constitutional claims - this Court has uniformly held that individuals seeking relief under 42 U.S.C. §1983 need not present their federal constitutional claims in state court before coming to a federal forum. Zablocki v. Redhail, supra, 46 U.S. Law Week at 4095, n. 5.

6.

The petitioners claim that the Fifth Circuit decision is in conflict with rulings in other circuits. The claimed conflicts are illusory.

First, there is no conflict with the decision in McCune v. Frank, 521 F.2d 1152 (2d Cir. 1975). The point of the discussion of the applicability of Younger and Gibson to pending administrative, disciplinary proceedings was that the District Court should have awaited the conclusion of those proceedings before it acted; here, there was no effort to enjoin the administrative proceedings, indeed, the respondents insisted upon them. Moreover, that discussion was dictum; the Second Circuit holding was that the District Court should consider whether the plaintiff was barred by res judicata resulting from unsuccessful state court litigation of identical issues by persons with whom the plaintiff might be in privity.

Second, many of the cases purportedly in conflict with the decision below involved the unique situation of state bar committee disciplinary proceedings against attorneys and thus the special relationship between state courts and members of their bars.

E.g., Anonymous v. Association of the Bar, 515 F.2d 427 (2d Cir. 1975); American Civil Liberties Union v. Bozhardt, 539 F.2d 340 (4th Cir. 1976); Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977). In such cases, the proceeding itself is usually of a quasi-judicial nature, direct review by the state appellate courts is mandatory, and the disciplinary action is usually not even final until that mandatory judicial review process is complete. No such factors exist here.

Third, cases such as Gonzalez v. Gonzalez, 536 F.2d 453 (1st Cir. 1976); Shelton v. Smith, 547 F.2d 768 (2d Cir. 1976); Lewellyn v. Gerhardt, 513 F.2d 184 (7th Cir. 1975); and Kelly Services, Inc. v. Johnson, 542 F.2d 31 (7th Cir. 1976), all involve the typical Pullman abstention situation where a federal challenge to a state statute may be wholly obviated depending on the proper state law interpretation of that statute. No such possiblity was present here.

7.

Finally, the petitioners contend that certiorari should be granted because the decision below conflicts with various earlier decisions in the Fifth Circuit. We think it suffices to respond that the Court below heard this case en banc, with full briefing and oral argument, that all of the cases cited were brought to that Court's attention, and that all thirteen judges joined in the decision, including the three concurring judges who only questioned the current reach of one earlier Fifth Circuit case. Finally, the Fifth Circuit has more recently considered similar issues in an en banc case, and has once again unanimously rejected a claim that federalism principles warrant abstention from deciding constituitonal questions. The language used there perfectly sums up the situation here:

> The Younger principles simply are not what the defendants would have them be: a broad, discretionary, device for the evasion of the responsibility of federal courts to protect federal rights from invasion by state officials. Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295, 299 (5th Cir. 1977)(en banc).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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